Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures	)	WT Docket No. 05-211

To: The Commission

REPLY COMMENTS OF CINGULAR WIRELESS LLC

Cingular Wireless LLC ("Cingular") hereby submits these reply comments in response to the Federal Communications Commission's ("FCC" or "Commission") *FNPRM* concerning the "designated entity" ("DE") auction rules and the comments previously submitted in this proceeding.[1] In the *FNPRM*, the FCC proposed to restrict the award of DE benefits to an otherwise qualified DE "where it has a 'material relationship' with a 'large in-region incumbent wireless service provider" to address concerns that the DE program "may be subject to potential abuse from larger corporate entities.'"[2] For the reasons that follow, Cingular agrees with those commenters who have objected to this proposal and rebuts certain claims that spectrum concentration among the five nationwide carriers supports the restriction.

INTRODUCTION

In this proceeding, the FCC seeks to preclude small businesses that have a "material relationship" with an established in region wireless carrier from qualifying for DE benefits. The

[1] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, *Further Notice of Proposed Rulemaking*, FCC 06-8 (rel. Feb. 3, 2006) ("*FNPRM*"), *summarized*, 71 Fed. Reg. 6992 (Feb. 10, 2006).

[2] *FNPRM* at ¶¶ 1, 10; *see also id.* at ¶ 15.

purported basis for this change in the DE eligibility requirements lacks record support, and the proposed change to the rules would, in any event, fail to remedy the alleged defect in the current rules.[3]

Cingular agrees with commenters[4] that the proposed rule lacks foundation and is otherwise arbitrary and capricious.[5] Moreover, the proposed remedy does not address the purported concern with respect to involvement by "larger corporate entities" with DEs. Prohibiting DEs from forming "material relationships" with four or five large wireless entities hardly solves the problem, given that DEs are free to form such relationships with the remaining Fortune 1000 – some of which are substantially larger than any wireless carrier.[6] There is no

[3] Not only is the proposed rule change without basis, the timing is unfortunate. Given the upcoming Advanced Wireless Services ("AWS") auction – the largest in recent history – it would be arbitrary and capricious to change the rules based on an assumed problem for which no record support exists even while prospective DE bidders might be trying to plan for the auction. A great deal of uncertainty exists for DEs as they must try to line up financing without knowing whether a subsequent rule change will render them ineligible. Moreover, if the rules were changed, based on the scant record, it would seem likely that subsequent challenges might prolong this uncertainty.

[4] *See* Comments of T-Mobile at 6 ("[T]he proposed rule revisions are misguided because they are not based on any documented abuse of the Commission's DE rules."); *see also, e.g.*, Comments of CTIA at 2-3, 7; Cook Inlet at 5-7, 14; Verizon Wireless at 4; *cf.* Comments of Minority Media and Telecommunications Council at 6 (acknowledging that the agreements between DEs and nationwide carriers "are presumably within the Commission's guidelines"). As Cook Inlet explains, "this arbitrary objection to participation by [large, incumbent wireless] carriers is belied by the past decade of actual experience." Comments of Cook Inlet at 13.

[5] 5 U.S.C. § 706; *see Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency decisions must reflect "'a rational connection between the facts found and the choice made'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Tripoli Rocketry Association, Inc. v. ATFE*, No. 04-5453, Slip op. at 13-14 (D.C. Cir. decided Feb. 10, 2006) (no deference is due where agency action is not supported by reliable evidence); *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 764 (6th Cir. 1995) ("[S]imply precluding a class of potential licensees from obtaining licenses (without a supported economic justification for doing so) solves the problem arbitrarily."); *see also, e.g., Menorah Medical Center v. Heckler*, 768 F.2d 292, 295 (8th Cir. 1985).

[6] *See* Comments of Dobson at 2-3; Verizon Wireless at 14; *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) (a rule must be consistent with its basis); *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) (a rule lacking a rational basis cannot be sustained).

reason – and certainly none in the record – for discriminatory treatment between similarly situated companies.[7]

As discussed below, claims by Council Tree and others that the tentative conclusion should be adopted to prevent concentration of spectrum in the hands of "dominant" national wireless service providers also miss the mark. First, there is no credible evidence presented to even suggest any undue concentration of spectrum. Second, the FCC regularly performs rigorous analyses of competition in wireless markets, and is able to impose targeted remedies when necessary.[8] A sudden repudiation of the FCC's case-by-case approach to concentration in favor of a kind of DE spectrum cap would not be considered reasoned decisionmaking.

I. THE PROPOSED RULE CANNOT BE JUSTIFIED ON CONCENTRATION GROUNDS

Some proponents of the FCC's proposed rule change claim that it should be adopted to prevent further concentration of spectrum by the "dominant" wireless carriers.[9] These concentration claims are baseless. They run counter to years of pro-competitive market findings by the Commission, and in any event are not addressed by the rule they purport to justify. To the extent proponents are seeking to revisit the Commission's decision not to impose aggregation limits on the upcoming auction, such claims go far beyond the scope of the notice and their

[7] *See Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965) (similarly situated cases should not be treated dissimilarly); *Cincinnati Bell*, 69 F.3d at 764 (cannot discriminate against a class without a supported economic justification for doing so).

[8] *See, e.g., Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Tenth Report*, 20 F.C.C.R. 15908 (2005) ("*Tenth CMRS Competition Report*"); *AT&T Wireless Services, Inc. and Cingular Wireless Corp*., 19 F.C.C.R. 21522 (2004), *recon.*, 20 F.C.C.R. 8660 (2005) ("*Cingular-AWS Order*"); *Western Wireless Corp. and ALLTEL Corp*., 20 F.C.C.R. 13053 (2005) ("*Western-ALLTEL Order*"); *Nextel Communications, Inc. and Sprint Corp*., 20 F.C.C.R. 13967 (2005) ("*Sprint-Nextel Order*").

[9] *See, e.g*., Comments of Antares at 3; Centennial at 4-5; ComScape at 1; Council Tree at 20; Leap Wireless at 3; Minority Media and Telecomm. Council at 6-7; MobiPcs at 1; RTG/OPASTCO at 3-4; SunCom at 1; USCC at 5; US Wirefree at 1; Wireless Broadband Service Providers Ass'n at 2, 6.

consideration at this late date is contrary to Section 309(j) because it does not give potential bidders sufficient notice to adequately prepare for Auction 66.

A. Claims of Market Concentration Are Baseless, Contrary to Commission Findings, and the Proposed Rule Is Not Targeted to the Asserted Problem

Council Tree and others present no individualized evidence of harmful concentration or market-specific failure that requires correction. To the contrary, their concentration claims are predicated upon faulty reasoning and misleading assertions. Specifically, they treat the five largest wireless carriers as if they were a single entity exercising monopolistic control over the industry's spectrum resources (as well as subscribers and revenue). As the FCC has repeatedly found, this is simply not the case.[10] The FCC regularly evaluates competitive conditions in wireless services. In a series of final findings by the Commission over the last five years, the FCC has repeatedly found that the wireless market is competitive and does not require prophylactic constraints against spectrum aggregation, preferring instead to rely on a case-by-case, market-by-market analysis to address concentration concerns:

- In 2001, the FCC decided to allow the former cap on the amount of cellular, PCS and SMR spectrum in which a licensee could have an attributable interest ("spectrum cap") to sunset, effective January 2003, on the basis of meaningful competition in the CMRS market. The FCC found the cap was no longer necessary "***in light of the strong growth of competition in CMRS markets*** since the initiation of the spectrum cap."[11]

- In 2003, the Commission found that spectrum aggregation limits are not necessary with respect to the AWS bands (to be auctioned in Auction No. 66), given vigorous competition in the marketplace: "***Given the robust state of competition in the CMRS market***, we do not feel it is necessary to impose an initial aggregation limit on these [the 1710-1755 and 2110-2155

[10] *See, e.g., Tenth CMRS Competition Report*, 20 F.C.C.R. at 15911-12, 15920.

[11] *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 F.C.C.R. 22668, 22670-71 (2001) (emphasis added).

MHz] spectrum bands. We prefer to provide potential licensees with maximum flexibility in these allocations."[12]

- In 2005, in its *Tenth CMRS Competition Report* to Congress, the FCC found that there was "***robust competition in the CMRS marketplace***."[13] The FCC further concluded that "although the mobile telephone market has become more concentrated as a result of the merger of two nationwide carriers [Cingular and AWS], ***none of the remaining competitors has a dominant share of the market, and the market continues to behave and perform in a competitive manner***."[14] The Commission made similar findings in approving the Sprint-Nextel and ALLTEL-Western Wireless mergers last year.[15]

Despite the mountain of data compiled by the FCC and the careful analysis of its staff in reaching these findings, the proponents of the FCC's proposed rule change to the DE rules suggest that the changes are needed to address undue concentration of spectrum. The proponents of the tentative conclusion offer no credible competitive analysis that would even suggest any market concentration that would require remediation. Given the FCC's repeated, well supported and well reasoned findings to the contrary, these assertions should be disregarded. To change these settled, consistent competition findings now (in some cases only months later), on the basis

[12] *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Report and Order*, 18 F.C.C.R. 25162, 25189 (2003) (emphasis added).

[13] *See Tenth CMRS Competition Report*, 20 F.C.C.R. at 15983.

[14] *See id*. at 15911. Council Tree acknowledges that absent "dominant" status (a characterization inconsistent with this and other post-merger findings by the Commission), "influence" by a wireless provider via a relationship with a DE that stops short of control "is not inconsistent with the purposes of the designated entity program." *See* Comments of Council Tree at 56.

[15] *See Sprint-Nextel Order*, 20 F.C.C.R. at 14011 ("[T]here are no local markets in which both of the Applicants have the dominant market shares that would suggest adverse competitive harm is likely."); *id.* at 14055 ("[T]his merger does not create market dominance in any particular market . . . .") (statement of Commissioner Copps); *ALLTEL-Western Order*, 20 F.C.C.R. at 13074, 13112-13 (finding that most markets post merger "will be no more concentrated than the average market today" or the change will be "negligible," and imposing divestiture conditions to remedy potential harms in other markets).

of misleading and faulty claims and in the context of determining DE eligibility rules, would represent a "sea change" and would signal unreasoned decisionmaking.[16]

Moreover, even if there were an issue of undue concentration to address, the proposed rule would not remedy the purported problem. As Council Tree itself acknowledges, "[n]ational wireless service providers would not be prevented under the Commission's new rule from acquiring any license."[17] Getting at spectrum aggregation by altering DE eligibility is simply not targeted toward addressing consolidation concerns and therefore is arbitrary.[18] Thus, even assuming the prevention of concentration was a valid basis and purpose, the proposed rule would be inconsistent with that basis and could not be rationally sustained on that ground.[19]

B. Leap's Request for a New Spectrum Aggregation Cap at this Late Date Goes Far Beyond the Scope of the *FNPRM*

In its comments, Leap ventures far afield of the *FNPRM* and asks the Commission to revisit its 2003 decision not to impose a spectrum aggregation limitation with respect to AWS spectrum.[20] Citing recent spectrum consolidation through mergers, Leap proposes an 80 MHz cap on AWS and CMRS spectrum.[21]

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[16] *See, e.g., State Farm*, 463 U.S. at 57; *National Conservative Political Action Comm. v. Federal Election Comm'n*, 626 F.2d 953, 959 (D.C. Cir. 1980); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). Any such abrupt change in course would send clear "danger signals" to a reviewing court, triggering careful "scrutiny" to ensure that the agency's change of course is not "based on impermissible or irrelevant factors" or is not "a product of 'result-oriented' rationalization." *Greater Boston*, 444 F.2d at 851; *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983); *Robbins v. Reagan*, 780 F.2d 37, 48 (D.C. Cir. 1985); *Continental Airlines v. CAB*, 519 F.2d 944, 956-57 (D.C. Cir. 1975).

[17] Comments of Council Tree at 5; *see* Comments of CTIA at 4.

[18] *See Cincinnati Bell*, 69 F.3d at 759-61.

[19] *See, e.g., New England Coalition on Nuclear Pollution v. NRC*, 727 F.2d 1127, 1131 (D.C. Cir. 1984); *Geller*, 610 F.2d at 980; *ALLTEL*, 838 F.2d at 561.

[20] Comments of Leap at 4.

[21] *See id.* at 5, 11.

Leap's attempt to impose a broadly applicable spectrum aggregation cap at this late date goes far beyond the scope of the *FNPRM*, which is examining whether to alter DE eligibility rules. As such, interested parties cannot be said to have received proper notice or an opportunity for meaningful comment.[22] Any decision to adopt such a cap at this late date would also raise clear danger signs given the 2003 decision not to impose an aggregation limit,[23] and would be contrary to Section 309(j)'s requirement that the ground rules for participating at auction be established sufficiently in advance of the auction to develop business plans and assess market conditions.[24] In any event, recent industry consolidation provides no basis to revisit the decision not to impose a cap. As noted, the Commission only recently concluded that notwithstanding recent mergers, the market remains competitive with no one competitor having a dominant share of the market.[25]

II. NO OTHER PURSUASIVE EVIDENCE IS PRESENTED UPON WHICH TO JUSTIFY THE PROPOSED RULE

No hard evidence is submitted in support of the proposed rule. The National Hispanic Media Coalition, however, submitted a declaration by an independent consultant purporting to analyze FCC auctions across the board.[26] As a threshold matter, it is impossible to meaningfully assess and comment on the declaration in less than five days – the amount of notice provided by the truncated reply deadline.[27] Moreover, it is predicated on data that the author describes as

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[22] *See* 5 U.S.C. § 553(b)(1)-(3), (c); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996); *Asiana Airlines v. FAA*, 134 F.3d 393, 396 (D.C. Cir. 1998). Leap's comments did not appear on ECFS until Monday, February 27, 2006. Reply comments are due Friday, March 3, 2006.

[23] *See supra* Section I.A.

[24] 47 U.S.C. § 309(j)(3)(E)(ii).

[25] *See supra* Section I.A.

[26] *See* Declaration of Dr. Gregory Rose ("Rose Declaration"), *appended to* Comments of National Hispanic Medial Coalition *et al*.

[27] 5 U.S.C. § 553(c); *see, e.g., Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994).

"incoherent" and "particularly difficult to retrieve."[28] This calls into question the reliability of the findings in the first instance.

Still, even a cursory review of the declaration reveals that it is not so much proof as politics. The declaration calls for "a complete restructuring of [the FCC's] entire system of competitive auctions"[29] – far beyond the scope of this proceeding. Despite what the declaration describes as a failure of the auction program as a whole,[30] it acknowledges the "success of the DE credit in facilitating new entrants."[31] This success has been predicated on current rules which encouraged maximum flexibility for DEs to associate with passive investors, including large wireless carriers. Yet, the author is curiously willing to support a change to the one aspect of that program he describes as successful.[32]

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[28] Rose Declaration at 1 n.1. The author's qualifications are not disclosed.

[29] Rose Declaration at 30. The author calls upon the FCC and Congress to further consider "the wisdom of allocating licenses by competitive auction at all." *Id*. at 30.

[30] Rose Declaration at 31 ("FCC spectrum auctions neither serve the public interest nor realize the promised economic efficiencies and revenue maximization."). For example, the declaration asserts auction reliance on the highest bid does not necessarily represent the best social value (*id*. 5 n.4); the program is subject to collusion (*id*. at 16); auctions tend to be dominated by a small group of bidders (*id*. at 7); and minorities and women have been ignored by the program (*id*. at 25).

[31] Rose Declaration at 2. Indeed, the FCC has recently cited to the "success of designated entities in auctions," noting that DEs have won 53% of all licenses in open auctions. *Service Rules for Advanced Wireless Services in the 1.7 and 2.1 GHz Bands*, 20 F.C.C.R. 14058, 14074 (2005). In its comments, MetroPCS, a self-described "designated entity success story," states that the DE program "has achieved some notable results" – pointing to "a number of other successful designated entities which have made valuable and substantial contributions to the wireless marketplace." Comments of MetroPCS at 3-4; *see also* Cook Inlet at 3-4; Aloha Partners at 2; Carroll Wireless at 3. According to MetroPCS, "[t]hese successes validate the Commission's designated entity program." Comments of MetroPCS at 4.

[32] *See, e.g., Ala. Power Co. v. FCC*, 311 F.3d 1357, 1371 (11th Cir. 2002) ("The policy decisions of agencies must be set aside if they are not the product of reasoned decisionmaking."); *see also International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 821 n.56 (D.C. Cir. 1983).

As support for the FCC proposal, the declaration states that increased consolidation and the lack of minority and women-owned participation suggests a need for corrective action.[33] Yet, the declaration does not analyze whether consolidation needs correcting (which, as discussed above, it does not) or whether the proposed rule will even affect consolidation, as any carrier can participate in the auction. Nor does it show that the proposal will in any way alter the number of women and minority owned entrants, given the fact that special provisions concerning these specific classes were eliminated by the FCC years ago following the Supreme Court *Adarand* decision.[34]

Finally, the declaration states that the proposed rule is justified in light of purported "evidence" of tacit collusion and the avoidance of head-to-head competition in auctions by "all members of the dominant incumbent hegemony."[35] Yet, the declaration cites to no evidence of collusion by large wireless carriers,[36] and no evidence that they have avoided head-to-head competition at auction.[37] To the contrary, the declaration focuses on auctions being won by a *few bidders*,[38] but this does not demonstrate that *large wireless carriers* collude or avoid competition at auction (or, for that matter, that DEs were not among those "few bidders"). In any event, if his supposition that "auctions . . . appear to serve the narrow interest of dominant actors in the telecommunications industry"[39] were correct, the rule changes he supports, by

[33] Rose Declaration at 2.
[34] *Adarand Constructors v. Pena*, 515 U.S. 200 (1995). Revisiting special auction provisions for these classes goes well beyond the scope of this proceeding.
[35] Rose Declaration at 32.
[36] *See* Rose Declaration at 16-17.
[37] *See* Rose Declaration at 18.
[38] *See* Rose Declaration at 7-13
[39] Rose Declaration at 30. Table 3 includes a list of the top 100 bidders in FCC spectrum auctions, but the listed entities are not analyzed for "dominance" in any relevant market. Indeed, the list of entities appears quite diverse. *See id*. at 11-13.

depriving DEs of prime sources of capital, would exacerbate the purported problem. This is unreasoned.[40]

CONCLUSION

For the foregoing reasons, Cingular opposes the proposal to restrict the award of DE benefits to an otherwise qualified DE "where it has a 'material relationship' with a 'large in-region incumbent wireless service provider."

Respectfully submitted,

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[40] *See State Farm*, 463 U.S. at 43.